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Supreme Court of the United States

OCTOBER TERM, 1981

NORTH SHORE UNIVERSITY HOSPITAL; FLORENCE FINCKE, ASSISTANT DIRECTOR, MATERNAL CHILD HEALTH CARE,

Appellants,

v.

STATE HUMAN RIGHTS APPEAL BOARD, STATE DIVISION OF HUMAN RIGHTS; ESSIE MORRIS,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF NEW YORK

JURISDICTIONAL STATEMENT

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Questions Presented

1. Whether Executive Law Section 296.10 is violative of the Establishment Clause of the First Amendment of the Constitution of the United States because it impermissibly entangles government with religion, does not reflect a clearly secular legislative purpose, and has a primary effect of advancing religion.

2. Whether Executive Law Section 296.10 is violative of the Establishment Clause of the First Amendment of the Constitution of the United States when applied to require a hospital to alter uniformly applied terms and conditions of employment, vary facially, non-discriminatory scheduling of shifts or coerce other employees to accommodate the purported religious beliefs of a Seventh Day Adventist Sabbath observer.

3. Whether Executive Law Section 296.10 is violative of the Due Process Clause of the Fifth and Fourteenth Amendments of the Constitution of the United States and should be void by reason of its vagueness.

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Supreme Court of the United States

October Term, 1981

No.

NORTH SHORE UNIVERSITY HOSPITAL; FLORENCE FINCKE, ASSISTANT DIRECTOR, MATERNAL CHILD HEALTH CARE,

Appellants,

v.

STATE HUMAN RIGHTS APPEAL BOARD, STATE DIVISION OF HUMAN RIGHTS; ESSIE MORRIS,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF NEW YORK

JURISDICTIONAL STATEMENT

Opinions Below

The decision of the Court of Appeals of New York, which appears in the appendix hereto, p. 1a, *infra*, is reported at —— N.Y.2d —— (1982).

The decision of the Appellate Division, Second Department, denying appellants permission to appeal to the Court of Appeals, which appears in the appendix hereto, p. 2a, *infra*, is reported at —— A.D.2d —— (2d Dept. 1982).

The decision of the Appellate Division, Second Department, adhering to its original determination, after reargument by appellants, which appears in the appendix hereto,

p. 3a, *infra*, is reported at —— A.D.2d —— (2d Dept. 1981).

The decision of the Appellate Division, Second Department, affirming the determination of the State Human Rights Appeal Board, which appears in the appendix hereto, p. 4a, *infra*, is reported at 82 A.D.2d 799 (2d Dept. 1981).

The determination of the State Human Rights Appeal Board, affirming the Decision and Order of the Commissioner of the State Division of Human Rights, dated November 24, 1980, is not reported. It is reprinted in the appendix hereto, p. 8a, *infra*.

The Decision and Order of the Commissioner of the State Division of Human Rights, dated July 17, 1979, is not reported. It is reprinted in the appendix hereto, p. 11a, *infra*.

Jurisdiction

North Shore University Hospital and Florence Fincke, the appellants, appeal from the final determination of the Court of Appeals of New York, dated May 20, 1982, denying appellants permission to appeal to said Court, thereby upholding the constitutionality of New York Executive Law § 296.10 on its face and as applied in this case.

The decision of the Court of Appeals of New York, denying appellants' motion for leave to appeal, was entered on May 20, 1982.

A notice of appeal to this Court was duly filed in the Court of Appeals of New York and the Appellate Division of the Supreme Court, Second Department, on August 17, 1982. *See* appendix, p. 22a, *infra*.

This appeal is being docketed in this Court within 90 days from the denial of permission to appeal below. The

jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2).

Constitutional Provisions and Statutes

1) First Amendment, United States Constitution:

Congress shall make no laws respecting an establishment of religion, or prohibiting the free exercise thereof . . .

2) Fifth Amendment, United States Constitution:

No person shall . . . be deprived of life, liberty, or property without due process of law.

3) Fourteenth Amendment, United States Constitution:

No state shall make or enforce any law which . . . shall . . . deprive any person of life, liberty, or property, without due process of law.

4) Title VII of the Civil Rights Act of 1964, Section 701(j) (42 U.S.C. § 2000e(j)):

> (j) The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

5) Title VII of the Civil Rights Act of 1964, Section 703(a)(1) (42 U.S.C. § 2000e-2(a)(1)):

> (a) it shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; . . .

6) New York Executive Law Section 296.10:

> 10. (a) It shall be an unlawful discriminatory practice for any employer to prohibit, prevent or disqualify any person from, or otherwise to discriminate against any persons in, obtaining or holding employment, because of his observance of any particular day or days or any portion thereof as a sabbath or other holy day in accordance with the requirements of his religion.
>
> (b) Except as may be required in an emergency or where his personal presence is indispensable to the orderly transaction of business, no person shall be required to remain at his place of employment during any day or days or portion thereof that, as a requirement of his religion, he observes as his sabbath or other holy day, including a reasonable time prior and subsequent thereto for travel between his place of employment and his home, provided however, that any such absence from work shall, wherever practicable in the judgment of the employer, be made up by an equivalent amount of time and work at some other mutually convenient time, or shall be charged against any leave with pay ordinarily granted, other than sick leave, provided further, however, that any such absence not so made up or charged, may be treated by the employer of such persons as leave taken without pay.
>
> (c) This subdivision shall not be construed to apply to any position dealing with health or safety where the person holding such position must be available for duty whenever needed, or to any position or class of positions the nature and quality of the duties of which are such that the personal presence of the holder of such position is regularly essential on any particular day or days or portion thereof for the normal performance of such duties

with respect to any applicant therefor or holder thereof who, as a requirement of his religion, observes such day or days or portion thereof as his sabbath or other holy day. In the case of any employer other than the state, any of its political subdivisions or any school district, this subdivision shall not apply where the uniform application of terms and conditions of attendance to employees is essential to prevent undue economic hardship to the employer. In any proceeding in which the applicability of this subdivision is in issue, the burden of proof shall be upon the employer. If any question shall arise whether a particular position or class of positions is excepted from this subdivision by this paragraph, such question may be referred in writing by any party claiming to be aggrieved, in the case of any position of employment by the state or any of its political subdivisions, except by any school district, to the civil service commission, in the case of any position of employment by any school district, to the commissioner of education, who shall determine such question and in the case of any other employer, a party claiming to be aggrieved may file a complaint with the division pursuant to this article. Any such determination by the civil service commission shall be reviewable in the manner provided by article seventy-eight of the civil practice law and rules and any such determination by the commissioner of education shall be reviewable in the manner and to the same extent as other determinations of the commissioner under section three hundred ten of the education law.

* * * *

Raising the Federal Question

Early in the administrative proceedings below, appellants raised the claim, in their brief to the State Human Rights Ap-

peal Board, that Executive Law Section 296.10 was unconstitutional because of its repugnancy to the Establishment and Due Process provisions of the United States Constitution. Although specifically mandated by statute (Executive Law Section 297a.7(a)) to review, *inter alia*, whether the order of the State Division of Human Rights is "in conformity with the constitution and laws of the state and the United States," and although appellants raised the repugnancy claims, the State Human Rights Appeal Board's Order (appendix p. 9a, *infra*) did not address the issue.

The constitutional claims were pressed by appellants before the Appellate Division of the Supreme Court of the State of New York, Second Department. Said court found appellants' constitutional claims to be "without merit" (appendix, p. 7a, *infra*).

After being denied permission to appeal to the New York Court of Appeals by the Appellate Division of the New York Supreme Court, appellants sought leave of the Court of Appeals for permission to appeal. In its motion papers and brief to said Court, appellants once again raised their constitutional claims. By denying appellants' motion for leave to appeal, the Court of Appeals rejected the federal constitutional claims and thereby denied appellants any further New York forum in which to litigate these substantial questions.

Statement of the Case

Appellant, North Shore University Hospital (herein, the "Hospital"), is and was at all relevant times, a voluntary, non-profit hospital with facilities at Manhasset, Long Island, New York. Appellant Florence Fincke (herein, "Fincke"), at the time of appellee Essie Morris' discharge from employment at North Shore, was Assistant Director of Nursing in its Maternal and Child Care Service.

In September of 1976, appellee Essie Morris (herein, "Morris") filed the charge over which appellee, State Division of Human Rights, asserted jurisdiction. The complaint alleged that appellants discriminated against her because of her religion as follows:

> 1. I have been an employee of the respondent for 9 years.
>
> 2. I am a Seventh Day Adventist and my sabbath is Friday after sundown to Saturday sundown. I have had no problems all these years re observance.
>
> 3. On August 30, 1976, I was advised that if I continue to take that time off I would be dismissed.
>
> 4. I believe this to be in violation of the law of this State.
>
> 5. I am a Seventh Day Adventist. Based on the above, I charge North Shore University Hospital; Florence A. [Fincke], Supervisor, with an unlawful discriminatory act by refusing to give me time off for my religious observance because of my creed, in violation of the Human Rights Law of the State of New York.

The facts that led to this charge, may be summarized as follows:

> (1) Morris began employment at North Shore on August 13, 1967. She had joined the Seventh Day Adventist Church in or about June or July of either 1964 or 1965.
>
> (2) Morris worked as a nurse's aide, also called nurse assistant, assigned to infant care.
>
> (3) The Hospital operates two kinds of nurseries for newborn babies: regular nurseries and the premature

special care unit. While Morris normally performed her duties in the regular nurseries, she occasionally worked in the premature special care unit.

(4) The nurseries, as well as the obstetrics department, the delivery room and gynecology, are administered by the Maternal and Child Care Service ("Service") of which appellant Fincke became Assistant Director of Nursing. They function around the clock, three shifts per day, seven days a week. The shifts, called the day, evening and night shifts, are 8 a.m. to 4 p.m., 4 p.m. to 12 midnight, and 12 midnight to 8 a.m.

(5) Each of the nurseries is staffed with four to five personnel, including one nurse's aide per nursery, at any one time depending on the number or "census" of babies. Staffing needs are determined by the average number of nursery care hours appropriate for proper care of an infant, and the daily baby census. The anticipated staffing requirement for any 24 hour period is calculated by multiplying the census times the nursery care hours per infant, divided by the 7½ hours worked by each person per day. The total is then divided again by three, since there are three shifts, to find the number of personnel needed per shift. The requisite number of patient care hours complies with the standards of nursing practice established by the profession and the joint commission of hospitals.

(6) The schedules for nursing personnel in the nurseries are made out and posted in advance. Job openings or shift vacancies are filled on a departmental seniority basis, taking into account the applicant's qualifications. Once an opening is filled, the employee

may remain in it without being bumped out. Requests by nurse's aides or assistants for a particular shift are honored only if there is an opening on the shift. Hospital policy is not to change an employee's shift unless requested by that employee. Hospital policy further dictates that shift changes, or substitutions, must not take place unless prior arrangements for coverage have been made to insure proper control, and unless the replacement has the qualifications sufficient for proper care.

(7) The concept underlying the staffing pattern is to achieve quality care with adequate coverage each day, giving all employees two days off per week. The prime concern in scheduling is quality care throughout the week, with about the same number of employees working each day. Weekends are treated in this regard like any other days of the week.

(8) In accordance with this policy, Morris initially was employed on the 4 p.m. to midnight shift, and then at her request, was transferred to the midnight to 8 a.m. shift when the opening came.

(9) In the event of an employee's absence from the nursery, due for example to sickness, the position must be filled either by bringing in an employee if possible from another area of the Service, or, as required in most instances, by drawing upon an outside part-time employment service with the prior approval of the Associate Nursing Director. Any replacements obtained from the existing workforce would be employees who already had experience working in the nurseries. An outside nurse replacement at the time of the administrative hearing below cost $54 for an eight hour day. Employees required by emergency

to work beyond their regular shifts receive pay at the overtime rate of time-and-one-half the straight time rate.

(10) Since it is important to maintain continuity for proper patient care, it is undesirable to "float" employees in from outside the Service. Moreover, it is difficult to find trained personnel. Not only does this process constitute a hardship because it is time consuming and risky with respect to quality care, but also it is costly since the outside workers must be paid on a per diem basis through a vouchering procedure.

(11) It is appellant Fincke's professional judgment that it is inconsistent with good patient care to substitute a stranger to the work on a given shift for someone familiar with it. An outsider brought in to cover on a shift does not know the particular needs of the child. Regular employees are better able to perform the essential tasks necessary to prevent infection or death.

Thus, permanent staff normally assigned to the same room, as distinguished from substitutes or part-time professionals hired from the outside, are better for patient care because the permanent employees come to know the babies under their care and their specific needs.

(12) Employees have four personal days a year after three months of employment which they may use any way they wish depending on staffing and patient care needs, but which usually they use for major religious holidays.

(13) Employees scheduled to work on their religious holidays either take a personal day if staffing permits,

or swap places with a colleague not scheduled to work. Employees entitled to exchange places under this policy are those who work in the same service under the same schedule but on different days. Continuity of care does not suffer from this practice because it involves health care workers employed in the same area who may even, by virtue of their normal schedules, at different times care for the same infant.

(14) In scheduling Morris' work, the Hospital made every reasonable effort to grant her Friday nights off, and approved every switch worked out with other employees.

(15) During the first nine years of employment, Morris usually was able to trade places on her Sabbath with either one of two other nurse's aides, but when those employees left, her other co-workers either could not or refused to switch. It then became Morris' practice, without advance warning, to call the Hospital on Friday at the time of her shift to say that she could not come in, resulting in a "conference" between Fincke and Morris in 1975 to deal with her absenteeism.

Having thus learned for the first time of Morris' apparent religious motivation, Fincke thereafter made as many arrangements as possible for Morris to have her Sabbath off, an effort concurred in by her supervisor, Associate Director of Nursing Phyllis Kowalski.

As a result, Morris received more time off than the schedules ordinarily would have allowed. Because no alternative job openings existed which would not have conflicted with Morris' Sabbath, Fincke consulted with Director of Personnel Patricia Melis. Then Fincke sent Morris to explore with Melis what could be done to find an available position satisfactory to her, includ-

ing any in the clinics where scheduling was 9 A.M. to 5 P.M. without shifts, to guarantee Morris her Sabbath off.

(16) Morris' Friday absenteeism triggered complaints from her co-employees that Fincke was playing favorite and that they too wanted their fair share of Fridays off. Personnel Administrator John Cusack sought positions in the Hospital which would not have interfered with Morris' Sabbath, and into which she could have been transferred. Morris was informed of at least two such jobs, for which she was interviewed but failed to qualify, one before and one after her termination.

(17) Although no nurse's aide jobs were available in the clinics, had any such opening occurred, it would have been posted, and Morris would have been considered for it.

(18) Accommodation of Morris would have meant coercion of other workers. Even though there is no union contract, any involuntary displacement would have been contrary to Hospital policy and practice.

(19) Notwithstanding her insistence that she be permitted to take her Sabbath off, Morris conceded that her religious beliefs did not make it wrong to care for infants in the Hospital on the Sabbath. Conceding that it would not violate her conscience on her Sabbath to feed, change, wash and perform tasks for infants directly related to their care, she testified that her objection was grounded in having to do nonessential cleaning, such as emptying trash or washing cribs and isolettes, and radio playing by her co-employees. Yet she did not alert appellants to these problems so that an adjustment could be made in her duties on her Sabbath or in her work environment.

(20) The strict injunction of the Seventh Day Adventist Church not to work on the Sabbath, directed even to police and firemen, does not apply to those of its members who work in hospitals. The Church in its own hospitals urges its employees to be mindful of the needs of others and not expect always to be off on the Sabbath. Even as to Sabbath employment in non-Seventh Day Adventist institutions the Church directs its members to make absolutely clear to their employers the duties they are willing to perform to maintain medical and hygienic patient care.

(21) After several conferences with Morris in which Fincke advised her that the Hospital was short in the nurseries because of her absences and warned her of the consequences, she was terminated on September 7, 1976 for failure to report for work on September 3, 1976.

The State Division of Human Rights found that appellants violated Executive Law Section 296.10 and ordered them *inter alia* to

1. Offer to re-employ Morris as a nurse's aid;

2. Schedule her work shifts so as not to conflict with her Sabbath;

3. Make her whole for back pay; and

4. Promulgate instructions that no person may be fired, barred from employment or retaliated against for refusing to work on his or her Sabbath or other holy days in accordance with the requirements of his or her religion.

The State Human Rights Appeal Board affirmed the Division's Order without reaching appellants' constitutional contentions. The Appellate Division of the Supreme Court

of the State of New York, Second Department, dismissed appellants' constitutional claims as being "without merit." After reargument the Appellate Division adhered to its original determination. Appellants next sought permission of the Appellate Division for leave to appeal to the Court of Appeals. Such permission was denied without opinion. A motion was made to the Court of Appeals for permission to appeal but said motion was also denied without opinion.

The Questions Are Substantial

The constitutional implications of a State law prohibiting discrimination on the basis of religion as does New York Executive Law § 296.10 and as construed to make a right to sabbath observance superior to rights under an otherwise valid seniority system are novel and substantial. The precise questions presented here have never before been treated by this Court.

In *T.W.A.* v. *Hardison,* 432 U.S. 63 (1977), this Court acknowledged but did not reach the constitutional questions raised by Sections 701(j) and 703(a)(1) of Title VII of the Civil Rights Act of 1964 (42 U.S.C. §§ 2000e(j) and 2000e-2(a)(1)). New York Executive Law Section 296.10 is virtually indistinguishable from its Federal counterpart under Title VII in that both statutes require accommodation of an employee's sabbath observance unless it causes undue hardship to the employer.

The issue in *Hardison* was the extent that Title VII required an employer to accommodate an employee whose religious beliefs prohibited him from working on Saturdays.

The extent of Section 296.10, as well as the constitutionality of a law requiring such accommodation in the face of valid seniority rules and work shift requirements, were the

questions raised below in this case. The reviewing Courts, however, brushed the constitutional arguments aside without discussion. The New York Supreme Court, Appellate Division, relied on *State Division of Human Rights* v. *Genesee Hosp.*, 68 A.D.2d 692, *rev'd sub nom. Matter of Genesee Hosp.* v. *State Div. of Human Rights*, 50 N.Y. 2d 917 (1980), which pointed to the existence of posted alternative job openings at the time of the complainant's discharge, suggesting an "attitude of indifference" toward her in that case (*Genesee*, 68 A.D.2d at 703). Since no job openings existed in this case, the Hospital has in effect been told that compliance with the statute requires creation of a job for appellee Morris, either by changing an otherwise valid shift concept, jeopardizing the proper administration of health care, or by displacing another employee.

It is abundantly clear that the failure to accommodate was neither the consequence of a discriminatory motive nor an "attitude of indifference", but rather due to the operation of the shifts, the suitability of which for administration of patient care has never been rebutted or questioned, and the Hospital's unwillingness to "bump" or coerce other employees.

It is undisputed that the First Amendment applies to the states through the Fourteenth Amendment. *Abington School District* v. *Schempp*, 374 U.S. 203 (1963); *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940).

In order to pass Establishment Clause muster, a law must survive the three-pronged test promulgated in *Committee For Public Education and Religious Liberty* v. *Nyquist*, 413 U.S. 756 (1973): (1) the law must reflect a clearly secular legislative purpose; (2) have a primary effect which neither advances nor inhibits religion; and (3) avoid excessive government entanglement with religion.

Section 296.10 fails all three prongs of the test. First, the statute's purpose as reflected in the Memorandum of Bill Introducers (Section 1 of L. 1967, c. 667, p. 1488) is non-secular:

> "The purpose of this bill is to insure observant Jews and other persons observing a day other than Sunday as their Sabbath or religious holiday that their positions are not insecure although they may not be able to work the regular work week."

Second, the statute imposes an affirmative duty to alter business-justified employment practices to fit an individual's religious requirements. Executive Law § 296.10, rather than simply banning discrimination on the basis of religion as it originally was drafted to do, isolates a preference for specific religions (those observing a day other than Sunday as their sabbath) and requires employers to modify their uniform work rules while also discriminating against other employees who do not share the same religious beliefs. Where no discriminatory motive has been demonstrated, and absent past discrimination that must be remedied, requiring the Hospital to modify its uniformly applied work schedules and other evenhanded employment practices in order to accommodate the demands of employees with certain religious beliefs or practices to the disadvantage of others without the same religious convictions constitutes an illegal preference on the basis of religion. The statute perpetuates a preference on account of religion and establishes religion in violation of the Establishment Clause, since it penalizes those employees who do not happen to hold the same religious beliefs as the sabbath observer. "The argument is particularly strong because the religious advantage burdens the other employees and the employer." *Minkus* v. *Metropolitan Sanitary District*, 600 F.2d 80, 86 (7th Cir. 1979).

When this Court faced the issue of whether collectively bargained seniority rights must give way under Title VII when necessary to accommodate religious observances, it decided that the statute was never intended to go that far. *Hardison, supra,* 432 U.S. 63, 79-81. Moreover, this Court said that "the strong congressional policy against discrimination in employment argues against interpreting the statute to require the abrogation of the seniority rights of some employees in order to accommodate the religious needs of others." *Id.* at 79, n.12.

Even though no collective bargaining agreement exists here, the Hospital strictly adheres to a seniority system justified by concerns for proper administration of health care and fairness to its employees. Appellants urge that the public policies supportive of these concerns are at least as important as a policy in favor of preserving the integrity of labor contracts.

Therefore, this Court's rationale in *Hardison* as to the reach of Title VII should be equally applicable in this case regarding the scope of Executive Law § 296.10. If the statute has the effect either as drafted or as applied of forcing a change in the Hospital's operationally justified and otherwise neutral seniority or shift policies, then it is unconstitutional in scope. Under the authority of *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747 (1976), this Court in *Hardison* concluded that "absent a discriminatory purpose, the operation of a seniority system cannot be an unlawful employment practice even if the system has some discriminatory consequences." *Hardison, supra,* at 82. Such seniority system should weigh the same whether embodied in a formal labor contract or in an employer's personnel policy. Certainly, employees who are its beneficiaries would not discern a difference.

Therefore, to upset a facially neutral seniority system or disrupt an employer's business to accommodate a particular

religious belief as required in this case, violates the Establishment Clause.

Section 296.10 also fails the third prong of the *Nyquist* test in excessively entangling government and religion by requiring a theological determination of the claimed legitimacy of sabbath requirements.

In *Gavin* v. *Peoples Natural Gas Company*, 613 F.2d 482 (3rd Cir. 1980), the Third Circuit Court of Appeals vacated a District Court decision granting summary judgment in favor of an employer in an employment discrimination case brought pursuant to 42 U.S.C. §2000e-2(a)(1) and remanded it for resolution of the fact question whether Gavin's beliefs were accommodated, assuming arguendo they were religious for Section 701(j) purposes. The Circuit Court held that a preliminary fact issue remained because if the employer did accommodate to Gavin's beliefs as required by Title VII, then no Title VII violation was established justifying Constitutional inquiry. The District Court had granted summary judgment on the ground that application of § 701(j) would lead to an unconstitutional entanglement with religion because a ruling on whether defendant had accommodated Gavin's religious beliefs in accordance with § 701(j) would necessitate a judicial determination of the tenets of Gavin's religion in contravention of the Establishment Clause. *Cf. Isaac* v. *Butler's Shoe Corp.*, 511 F. Supp. 108 (N.D. Ga. 1980). In vacating and remanding for resolution of the fact issue, the Circuit Court left the constitutional issues undecided. *Gavin, supra*, 613 F.2d at 484.

The Third Circuit, while recognizing the importance of the constitutional questions, left them to be resolved another day. However, the District Court's warning has particular relevance to a case such as appellants now urge before this Court:

> We shudder at (and believe the First Amendment would be shaken by) a courtroom scene wherein experts would be cross-examined as to the legitimacy of a specific religious conviction.
> Because proceeding to trial on the facts of this case would necessarily lead to an entanglement of this court with religious beliefs, requiring us to abandon the constitutionally-mandated "hands off" attitude in matters of religion and conscience, we find that this amendment cannot constitutionally be applied to the case before us. 464 F. Supp. at 632.

While "lip service" is given in the statute under examination here to the principle of balancing interests, actually no balancing occurs because as interpreted below the statutory presumption is that religious beliefs outweigh legitimate business concerns. Moreover, in the instant case a resolution of the constitutional questions would be timely because appellants have already been found to have failed to accommodate Morris' religious beliefs where the religious nature of those beliefs for Section 296.10 purposes is disputed.

Therefore, under the First Amendment tests established by the Court, Executive Law Section 296.10 may not properly stand.

Appellants also contend that § 296.10 of the Executive Law is so vague, uncertain and indefinite that it cannot constitutionally stand because it denies due process of law guaranteed by the Fifth and Fourteenth Amendments.

To survive constitutional challenge on vagueness grounds, reasonable precision, objective norms, and intelligible expression are required. *Big Mama Rag, Inc.* v. *U.S.*, 631 F.2d 1030, 1035 (D.C. Cir. 1980). In order to determine the vagueness of a statute, a court must ascertain whether its language provides sufficient definiteness so as to provide

"explicit standards" for those who must apply it. *Hynes* v. *Mayor of Oradell*, 425 U.S. 610, 622 (1976).

The statute neither defines the religious practices and beliefs it seeks to preserve and protect, nor provides sufficient guidance as to when its exceptions apply. To this day, the Hospital does not know how it must act under this statute except (as expressly required by the Administrative Agency's Order) never to fire, bar from employment or retaliate against any employee who refuses to work on his or her sabbath.

Subparagraph (a) of Section 296.10, in failing to define "observance" of a sabbath in accordance with a person's religion, invites the very constitutionally repugnant theological debate which occurred below, in which the sincerity of appellee Morris' claim in light of her admissions about what she could and could not do on her Sabbath was cast in doubt.

As stated by the District Court in the *Gavin* case, 464 F. Supp. 622 (W.D. Pa. 1979), *rev'd on other grounds*, 613 F.2d 482 (3rd Cir. 1980) concerning the due process denial:

> . . . . Since we have such difficulty defining religion in a legal context, we realize how difficult it must be for employers to understand their responsibilities under the "religious accommodation" provision and how valid due process denials or "vagueness" arguments could be asserted. These "due process" and "establishment" problems are like the blanket which, when pulled up over the head, uncovers the feet. Any legislative definition would make the limits of protection of the act more clear and ease our due process concerns; however, since all definitions are inclusive and exclusive by nature, any legislative judicial definition of religion invites a First Amendment problem. *Id.* at 632-633.

Similarly unclear in subparagraph (b) are the words "emergency" and "indispensable", which the statute leaves undefined.

The broad exclusions in subparagraph (c) for positions dealing with health or safety reasonably should have applied to appellee Morris' nursing position at the Hospital. Yet this contention also was rejected by the courts below without discussion, leaving no clue as to whether the statute would apply to any position within any health care institution such as the Hospital. The Agency argued below that the Hospital should have done more to coax its employees to switch places with Morris. However, neither the Hospital nor any other employer should have to guess about an affirmative duty not contained in a statute, especially where the effort appears futile.

It is respectfully urged that the burden of coping with these ambiguities now unconstitutionally lies with the employers of this State. The statute is utterly and improperly silent about an employer's duty when, as here, no alternative jobs are open which do not encroach upon an employee's sabbath requirements. Accordingly, the statute should be void for vagueness under the Due Process clauses of the Fifth and Fourteenth Amendments.

Conclusion

For these reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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